BRENT A. BURNETT (4003)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Attorneys for Defendant Mark L. Shurtleff
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

**IN THE UNITED STATES DISTRICT COURT, CENTRAL DIVISION
DISTRICT OF UTAH**

UNIVERSITY OF UTAH, a body corporate and politic under Utah law, and J. BERNARD MACHEN, President of the University of Utah,	:	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**
Plaintiffs,	:	
v.	:	
MARK L. SHURTLEFF, Utah Attorney General,	:	Case No. 2:02-CV-0212-K
Defendant.	:	Judge Dale A. Kimball

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION TO DETERMINE WHETHER A STATE OFFICIAL HAS VIOLATED STATE LAW

Attorney General Shurtleff does not claim that the Eleventh Amendment prohibits this Court from considering the plaintiffs' federal claims. But both the Eleventh Amendment and the principals of federalism that it rests upon preclude this Court from instructing a state officer on how to conform his conduct to state law.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst State Sch. v. Halderman, 465 U.S. 89, 106 (1984).

Plaintiffs do not contest this, but instead claim that this jurisdictional issue has somehow been waived by the fact that Attorney General Mark Shurtleff's motion argued the merits of the state law claims (in the alternative) and by his public statements that he desires judicial resolution of the legal question presented in this action. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings at 9-10. In supporting this claim, the plaintiffs rely, in part, upon a Ninth Circuit decision which is directly contrary to the binding precedent established by the Tenth Circuit.

Plaintiffs fail to recognize that the Eleventh Amendment immunity can only be waived by "an unequivocal waiver specifically applicable to federal-court jurisdiction." Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226, 1233 (10th Cir. 1999) (quoting Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 241 (1985)). Sutton does not support the plaintiffs' claim. In Sutton, the Court found an extraordinarily effective waiver of the Eleventh Amendment by the State of Utah based upon its affirmative conduct in removing the action from state court to federal court. The Court clearly distinguished this affirmative act of the State of Utah, in bringing the action into federal court itself, from claims (which had been previously rejected by the Court) that Utah had

waived its immunity by entering an appearance and litigating an action initially brought in federal court. 173 F.3d at 1235.

Instead of citing Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) for the proposition that the Eleventh Amendment immunity is waived by voluntarily appearing and defending an action on the merits, the plaintiffs should have considered Richins v. Industrial Construction, Inc., 502 F.2d 1051, 1055-56 (10th Cir. 1974). In Richins, the Court reviewed Utah's retention of sovereign immunity in its Governmental Immunity Act and the conduct in the trial court of the State of Utah. The Court found that Utah had not waived its immunity even though the issue was not raised until the case was on appeal from an unfavorable monetary judgment.

> Can the Eleventh Amendment be waived by the attorney general of the state entering an appearance and litigating in the case in the face of the mentioned statutory language? We are of the opinion that it cannot be so waived.

502 F.2d at 1056.

The same result was reached in V-1 Oil Co. v. Utah State Department of Public Safety, 131 F.3d 1415 (10th Cir. 1997), where the immunity question was only raised on appeal sua sponte by the Court and had not been raised at all in the district court.

> The defendants do not dispute that they have appeared throughout this action without invoking Eleventh Amendment immunity or that "[a] state may waive its Eleventh Amendment immunity and consent to suit in federal court." However, "[t]he mere fact that [the defendants] ha[ve] appeared in this suit, without explicitly invoking Eleventh Amendment immunity does not, by itself, constitute a waiver of Eleventh Amendment immunity."

131 F.3d at 1421 (citations omitted) (alterations in original). See also Mascheroni v. Board of Regents of Univ. of California, 28 F.3d 1554, 1560 (10th Cir. 1994) ("the mere fact that the Board

of Regents has appeared in this suit, without explicitly invoking Eleventh Amendment immunity, does not, by itself, constitute a waiver of Eleventh Amendment immunity.").

The binding precedent established by the Tenth Circuit is that appearing in an action and arguing the merits does not constitute an unequivocal waiver specifically applicable to federal-court jurisdiction. The same is true of the defendant's comments quoted from newspaper stories. At no time has Attorney General Mark Shurtleff unequivocally waived his Eleventh Amendment immunity from suit in a federal court on state law claims. Such claims are appropriately raised only in the Courts of the State of Utah, not in this Court. For this reason, the defendant urges this Court to dismiss the plaintiffs' state law claims for lack of jurisdiction.

II. THE PLAINTIFFS ARE WITHOUT AUTHORITY TO BRING A FIRST AND FOURTEENTH AMENDMENT CLAIM AGAINST THE DEFENDANT

> The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. . . . In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.

Trenton v. New Jersey, 262 U.S. 182, 188 (1923) (footnote omitted).

The only federal claim raised by the plaintiffs is one brought under the Fourteenth Amendment. While plaintiffs rely on Branson School District v. Romer, 161 F.3d 619 (10th Cir. 1998) for the proposition that a political subdivision can sue its state for a claim arising under other federal laws, they have failed to recognize the most relevant holding of that decision. "It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment." 161 F.3d at 628. It is also significant that Branson

relied, in part, on the Eleventh Circuit's decision in United States of America v. State of Alabama, 791 F.2d 1450, 1455 (11th Cir. 1986) which held that a state university, as a creature of the state, could not raise a Fourteenth Amendment claim under Section 1983 against the state. Last year the Tenth Circuit once again confirmed that a political subdivision of a state cannot assert federal constitutional rights to challenge state action.

> This court in Ponca City reasoned that because "political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state. Hence, unless expressly granted the ability by its creating state, a political subdivision cannot assert federal constitutional rights in opposition to state action."

Rural Water Dist. No. 1 v. City of Wilson, Kan., 243 F.3d 1263, 1274 (10th Cir. 2001).

Nor are the remainder of the cases cited by the plaintiffs relevant. Lassen v. Arizona, 385 U.S. 458 (1967) did not involve a constitutional claim against a state brought under the Fourteenth Amendment. Instead it dealt with a review of the Arizona Supreme Court's interpretation of the New Mexico-Arizona Enabling Act, a separate federal law. Nor does Washington v. Seattle School District, 458 U.S. 457 (1982) assist the plaintiffs. This case did not address the issue before this Court. Indeed, any effort to extract a silent holding from this decision on the issue is placed in doubt by the more recent decision of the United States Supreme Court in Will v. Michigan, 491 U.S. 58, 71 (1989). Will expressly held that states (such as Washington) are not "persons" such as can be sued under Section 1983. And yet the State of Washington was a named defendant and petitioner to the United States Supreme Court and the Court did not address the fact that this defendant was improperly before the Court. Because the issue was not raised in Washington, this case is not precedent and it does not effect the more recent decisions of the Tenth Circuit Court of Appeals.

Because the plaintiffs cannot bring an action against the state and its officers for alleged violations of the Fourteenth Amendment, the plaintiff's federal claim should be dismissed.

III. PLAINTIFFS ARE WITHOUT STANDING TO BRING THIS ACTION

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> The party invoking federal jurisdiction bears the burden of establishing these elements.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted).

The plaintiffs have failed to meet any of these essential elements of standing. Standing is a jurisdictional prerequisite. Phelps v. Hamilton, 122 F.3d 1309, 1316 (10th Cir. 1997). Because the plaintiffs have failed to allege facts in their complaint that would show that this Court has jurisdiction, this matter should be dismissed without prejudice.

A. Plaintiffs Have Suffered No Injury In Fact

In opposing the defendant's motion, the plaintiffs rely upon the conduct of third persons and not that of Attorney General Mark Shurtleff. Memo in Opposition at 15-19. No effort is made to show what authority or control the defendant has over the Utah State Legislature or individual students and employees of the University of Utah. It would appear that, without supporting legal precedent, the plaintiffs are asking this Court to make the Attorney General of Utah responsible for all those who may agree with his legal opinion and be liable for their actions.

The fact that an Attorney General issues a formal opinion and publicly states his view on what the law of Utah is, does not injure the plaintiffs. 1st Westco Corp. v. Sch. Dist. Of Philadelphia, 6 F.3d 108, 113-15 (3rd Cir. 1993) (Attorney General could not be sued for issuance of non-binding opinion); Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 441 (7th Cir. 1992) ("Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the eleventh amendment does not permit in the absence of such authorization").

B. No Causal Connection Has Been Alleged Between the Defendant and Any Injury

In claiming that they have shown a causal connection between the actions of the defendant and their alleged injuries, plaintiffs rely on Pierce v. Society of Sisters, 268 U.S. 510 (1925) and other cases in which First Amendment standing was conferred upon individuals who had been threatened with prosecution without requiring that they await the actual prosecution before seeking federal relief. Id. at 533. But these cases are not relevant. Plaintiffs have not shown that they have been threatened with any form of prosecution by the defendant. Instead, plaintiffs would have this Court determine that a public official can be sued simply because his public statements concerning the state of the law are contrary to the beliefs of the perspective plaintiff. Such a broad definition of causal connection would actually have an inappropriate "chilling effect" on the free speech of government officials. State officers would be hesitant to speak out on issues of public concern for fear that their expression of an opinion could lead to litigation.

The fact that an Attorney General issues a formal opinion does not create standing, even if the plaintiffs complain of the actions of third-persons who support their conduct by reference to the Attorney General's opinion. In 1st Westco Corp. v. Sch. Dist. Of Philadelphia, 6 F.3d 108, 113-15 (3rd Cir. 1993) (Attorney General could not be sued for issuance of non-binding opinion), the court rejected the idea that a high state official could be liable for simply giving non-binding legal advice in the form of an opinion. Where the Pennsylvania Attorney General had not threatened any prosecution, his issuance of an opinion to an interested third-person did not subject him to liability.

The same result was reached in Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 441 (7th Cir. 1992) ("Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the eleventh amendment does not permit in the absence of such authorization"). The court held that an Attorney General who had not threatened the plaintiffs with prosecution could not be sued and had to be dismissed. This is especially significant because the court went on, against appropriate defendants, and granted relief.

C. The Plaintiffs' "Injury" Cannot Be Redressed By a Judgment Against the Defendant

Plaintiffs have failed to explain how a judgment against Attorney General Mark Shurtleff will stop the Utah Legislature and unnamed students and employees of the University of Utah in their action. Such a decision, especially on the question of state law, would not be binding on the legislative branch of the State of Utah. It would not be binding on any of the individuals whose

conduct the plaintiffs complain of. Nor would it prevent proper actions brought in state court to determine the authority of the University of Utah and its relation to the Legislature.

A judgment against Attorney General Shurtleff would not prevent students or employees from bringing independent challenges to the validity of the University's firearms policies. No judgment entered in this action would stop students or employees from ignoring these same policies. Nor could any judgment prevent the Utah Legislature from setting whatever level of funding that it desired for the University. Finally, no judgment against the defendant would effect the authority of the Utah Legislature to enact whatever state firearms laws that they determined were appropriate.

The plaintiffs have failed to allege facts sufficient to meet any one of the three elements of standing, let alone all three. For this reason this Court should dismiss this matter for lack of standing.

IV. UNDER UTAH LAW, THE UNIVERSITY OF UTAH IS NEITHER SELF-GOVERNING NOR AUTONOMOUS

In claiming autonomy, the University of Utah relies on single justice concurrences to decisions of the Utah Supreme Court, instead of the majority opinions. Memo in Opposition at 23-25. While these concurring justices talk of the legislature not being able to govern the University, that is not what the majority opinions state. In University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 295 P.2d 348 (1956) the court determined that at Utah's Constitutional Convention, "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an expression of intent be found that the Legislature

should forever be prohibited from acting in any matters dealing with the purposes and government of the University except its establishment and location." Id. at 368 (emphasis added). In Petty v. Utah State Board of Regents, 595 P.2d 1299, 1300-1 (Utah 1979) the court again found that the University of Utah was subject "to the general legislative control and budgetary supervision as are other departments of state government." The decisions of the Utah Supreme Court have clearly rejected the autonomy sought for the University of Utah by the plaintiffs.

CONCLUSION

For the reasons stated above, defendant Mark Shurtleff, Attorney General of the State of Utah asks this Court to dismiss this action for lack of jurisdiction. In the alternative, defendant asks that this matter be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

DATED this _____ day of August, 2002.

_____
BRENT A. BURNETT
Attorney for Defendant Mark L. Shurtleff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of August, 2002, a true, correct and complete copy of the foregoing was delivered to the following attorneys as indicated below:

Alan L. Sullivan
Todd M. Shaughnessy
Kimberly Havlik
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

_____ U.S. Mail
_____ Hand Delivered
_____ Overnight
_____ Facsimile
_____ No Service

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